IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

PETN,UNDER ARBITRATION ACT. No 14 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE D.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HARIBHAI V. CHANDPA

Versus

JAMNAGAR MUNICIPAL CORPORATION

Appearance:

1. PETN,UNDER ARBITRATION ACT. No. 14 of 2003

MR HK PARMAR for Petitioner No. 1

MR JR NANAVATI for Respondent No. 1

NOTICE SERVED for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE D.K.TRIVEDI

Date of decision: 09/03/2004

ORAL JUDGEMENT

Heard Mr. Parmar, learned advocate for the

petitioner and Mr. J.R. Nanavati, learned advocate who appeared for the Jamnagar Municipal Corporation at length.

2. This petition is pending since the issuance of notice to the respondent Corporation, in view of the order dated 7th March, 2003 and the notice was made returnable on 4th April, 2003. Thereafter, considering the request made, the matter was adjourned from time to time. In response to the notice issued to the respondent, reply affidavit is filed on behalf of Jamnagar Municipal Corporation dated 16th June, 2003 by annexing certain documents by highlighting their stand in the matter, in which, the petitioner has prayed for an appointment of an Arbitrator under Section 11 of the Arbitration and Conciliation Act (hereinafter to as "Act" for short). A reply affidavit was duly served to Shri Parmar on 20th June, 2003 and rejoinder affidavit is filed by Shri Haribhai V. Chandpa on behalf of the petitioner, who was the sole proprietor, dated 21st July, 2003. A copy of which was duly served to Mr. Nanavati on 22nd July, 2003.

3. In view of the order passed by the learned Chief Justice nominating me to deal with the arbitration matters, the matter has reached before me and during hearing, Mr. Parmar, learned advocate has taken me through the petition with the documents attached thereto and the reply affidavit filed on behalf of Corporation through Deputy Engineer and the rejoinder affidavit filed on behalf of the petitioner and also cited certain decisions in the matter in support of his contention. Mr. Parmar has mainly placed reliance upon following judgements :-

(i) In the matter between SHETTY'S CONSTRUCTIONS CO. PVT. LTD. VS. KONKAN RAILWAY CONSTRUCTION AND ANOTHER, reported in 1998 (2) Arb. LR p.314.

(ii) In the matter between HYTHRO POWER CORPORATION LTD. VS. DELHI TRANSCO LTD., reported in 2003 (5) SCALE p.590.

(iii) In the matter between DIGVIJAY CEMENT CO. LTD. VS. UNION OF INDIA, reported in 1998 (2) Arb. LR p.317

(iv) In the matter between NATIONAL ALUMINIUM CO. LTD. VS. METALIMPEX LTD., reported in (2001) 6 Supreme Court Cases p.372.

4. It is the contention of Mr. Parmar that this

petition is filed under Section 11 (5) of the Act for seeking appointment of a Sole Arbitrator for adjudication of the dispute by relying upon agreement arrived at between the parties and as per the legal notice issued to the respondent Corporation dated 18.10.1995. Along with the petition, the petitioner has also annexed the Arbitration clause in B-1 form for the appointment of an Arbitrator of the General conditions of the contract. As per tender agreement, Clause 30 (1) of the Agreement is in respect of Arbitration Clause in respect of the dispute for which, such dispute is required to be referred to before the Arbitrator. Mr. Parmar has also taken me through the legal notice issued to the respondent as well as to Executive Engineer on 18.10.1995 and as per said notice, the details were furnished in respect of the work contract undertaken by the petitioner and correspondence arrived at between the parties, wherein, the petitioner has claimed various amount, as highlighted in the notice claiming Rs.25,62,094=00 + interest and costs and called upon the Corporation to make payment as per the notice, failing which, his client will compel to file suit for recovery of the said amount or for appointment of an arbitrator for adjudicating the dispute. It is further found from the petition that in reply to the legal notice issued by the petitioner to the Corporation, a detailed reply was filed by the Corporation signed by the Executive Engineer, Jamnagar Municipal Corporation dated 25.1.1996 and it is the case of the Corporation that at the instance of the petitioner Contractor, the Contractor has abundant the work without prior sanction of the Corporation, for which, the Corporation has suffered a great damage and the Corporation was entitled, as per the agreement and the conditions attached to contract and the work was to be completed with third party at the costs and consequences of the contractor and the case of the contractor, for the claim against the Corporation as well as for appointment of arbitrator was denied.

5. In respect of the legal notice issued by the petitioner Contractor, the petitioner had instituted a suit before the learned Civil Judge (SD) Jamnagar on 11.6/7.1996 and the said suit was registered being Special Civil Suit No. 96 of 1996. The petitioner has also annexed the original plaint in the said suit with order passed by the learned trial Judge dated 6.1.2003 at Annexure - D collectively.

6. Mr. Parmar has vehemently urged that as per the contract agreement, after giving legal notice to the Corporation, the petitioner has instituted a Civil Suit

before the trial Court and prayed for appointment of Sole Arbitrator as per the provisions of Section 20 of the Indian Arbitration Act, 1940 and the petitioner has prayed that the respondent Corporation be directed to file original agreement of the work contract and prayed that Justice P.M. Chauhan, Retired Judge of the High Court be appointed as Sole Arbitrator to resolve the dispute as per clause 30 of B-2 form of the tender agreement. During the pendency of the suit and after the new Act came into force, the petitioner original plaintiff has submitted an application Ex. 46 in the form of written arguments contenting that in view of the claim in the suit, where, the plaintiff has claimed Rs.25,62,094=00, the Court in which, the suit is filed, has no jurisdiction in light of the decision of the Apex Court reported in 1998 (2) Arbitration Law Reporter (SC) p.314 and in view of the enactment of new Arbitration Act, the court in which the suit is filed, is not competent to appoint arbitrator and prayed that the plaint in the suit be handed over to him for presentation to the proper Court. The plaintiff has also placed reliance upon the Notification issued by the Government and the scheme framed for appointment of Arbitrator by the High Court and has prayed that as the Court has no jurisdiction to entertain the suit, the plaint be returned to the plaintiff for presentation before the proper Court and as per order dated 6.1.2003, the learned trial Judge has accordingly, returned the plaint for presentation to the proper court. This petition is filed on 28.1.2003 and as found from the title of the petition, the petitioner has approached this Court by filing application under Section 11 (5) of the Act and there is also a Reference of Special Civil Suit No. 96 of 1996. According to Mr. Parmar that plaintiff has already approached after giving legal notice to the Corporation and by relying upon the Arbitration Clause, the respondent Corporation was called upon to make payment in favour of the plaintiff and also prayed for appointment of Arbitrator for adjudication of the dispute between the parties, as per Clause 30 of the Arbitration Clause. Mr. Parmar has accordingly contended that when during the pendency of the suit till 2003 and in view of the scheme framed by the High Court for appointment of Arbitrator, the petitioner had moved the trial Court and prayed for return of the plaint for presentation before the proper court and under the scheme, the petitioner has filed petition before this Court praying for appointment of Arbitrator and as there is a dispute and there is an arbitration clause and in light of the decision of the Apex Court in the matter of Hythro Power Corporation Ltd. (Supra), Arbitrator be appointed to resolved the dispute

between the parties. It is the contention of Mr. Parmar that there is an Arbitration Clause and as per the said Arbitration Clause, the petitioner has sought for relief for appointment of Arbitrator by filing Civil Suit before the trial Court under Section 20 of the Indian Arbitration Act, 1940 and when the trial Court has no jurisdiction in respect of the claim of the plaintiff, the plaint in the said suit was ordered to be returned to plaintiff for presentation to the proper court and accordingly, the present petition is filed by producing original plaint of Special Civil Suit No. 96 of 1996 with the order of the trial Court dated 6.1.2003 and in light of the decision of the Apex Court, the matter requires for appointment of arbitrator and accordingly, prayed that appointment of arbitrator be made.

7. Mr. J.R. Nanavati, learned counsel for the respondent Corporation has vehemently urged while taking me through the reply affidavit filed by Jamnagar Municipal Corporation that present petition deserves to be dismissed on the ground that petitioner has not approached the Court with clean hands and while filing this application, the petitioner has suppressed material fact in respect of the claim of the petitioner contractor against the Corporation, as the petitioner was aware about the fact and development taken place in respect of claim of the petitioner during the pendency of the suit filed by the petitioner before the trial Court for seeking relief in respect of appointment of an Arbitrator. It is also his contention that as found from the reply affidavit filed, it is clear that Corporation has passed Resolution in respect of the dispute i.e. work contract, of respondent with petitioner and in view of the fact that a Resolution passed by the Standing Committee on 19th September, 2002 and counter agreement was arrived at between the parties on Stamp Paper of Rs.50=00 and the said Stamp Paper was purchased in the name of the petitioner Shri Haribhai on 9.1.2003 and the counter agreement was executed between the parties in respect of the agreement, which was executed between the parties earlier on 15.2.1992 and in view of the said agreement between the parties, the petitioner is not entitled for the relief sought for, for an appointment of an Arbitrator by relying upon the Arbitration Clause, as earlier agreement arrived at between the parties had come to an end and the petitioner has no case for seeking appointment of an Arbitrator. It is the contention of Mr. Nanavati that relevant documents namely the Resolution passed by the Standing Committee dated 19th September, 2002 and subsequent agreement executed between the parties, is known to the petitioner and this relevant

fact about the claim of the petitioner in respect of the contract work, the petitioner has kept back this document and withheld this material and only on that ground, the petitioner is not entitled for appointment of an Arbitrator and according to him, even as per the subsequent agreement arrived at between the parties, the parties were required to abide Clause - 10 of the said fresh agreement, wherein, final decision of the Commissioner is binding to the contractor. The agreement also suggests that in respect of the suit filed by the contractor being Civil Suit No. 96 of 1996, in which, the petitioner contractor himself has agreed to withdraw the said suit and also agreed that even in future, in respect of this work, he will not institute any suit. Mr. Nanavati has accordingly, placed reliance upon these documents and has annexed documents in the affidavit filed by Shri Harilal Nakum, Deputy Engineer working with the respondent Corporation. It is the contention of Mr. Nanavati that petitioner contractor had also executed an undertaking in the form of letter on the Stamp Paper of Rs.50=00 purchased by the petitioner contractor on 24th June, 2002 and the petitioner had also withdrawn the security deposit of Rs.36,250-00, where, there is also a Reference that petitioner Contractor has agreed to receive the amount without any interest, for which, a written undertaking was submitted on 16th April, 2002.

8. In reply to the said affidavit in reply filed by the respondent Corporation, the petitioner Haribhai has also filed rejoinder affidavit dated 21st July, 2003 and as found from his affidavit, it is the case of the petitioner that in spite of his claim of filing petition for seeking relief of appointment of an Arbitrator and contractor has denied the case put forward by the Corporation in the affidavit in reply filed by Shri Nakum.

9. In light of this back ground and when this court is required to consider that whether the petitioner has made out a case for appointment of an Arbitrator as contemplated under the Scheme, it is true that petitioner was awarded contract in respect of work order given by the Corporation and there was an agreement between the parties in respect of completion of the work under the contract and there is an arbitration clause. It is also an admitted fact that before that, legal notice was issued by the petitioner to the Corporation for his claim in respect of the work carried out by the petitioner contractor in respect of the work order under the Contract and the claim of the petitioner contractor was refused by the Corporation by giving reply to the legal

notice issued by the Contractor. It is also an admitted fact that thereafter, the petitioner contractor has instituted a suit before the trial Court and the petitioner has prayed for an appointment of an Arbitrator by relying upon the agreement and the clause in the agreement for appointment of Arbitrator. During the pendency of the suit, claim of the petitioner was considered and the Standing Committee of the Corporation has passed resolution on 19th September, 2002, which is annexed with the affidavit of Shri Nakum at Annexure R1. As transpire from the document R-2, is a counter agreement between the parties and the said document is executed between the parties on a Stamp paper of Rs.50-00 and the said Stamp Paper was purchased in the name of petitioner Shri Haribhai on 9.1.2003. As per the counter agreement arrived at between the parties, there is a Reference of earlier agreement dated 15.2.1992 and the parties have accordingly arrived at fresh agreement and the parties were agreed to abide the settlement arrived at between them. The documents R-3 and R-4 show that Deputy Engineer, Jamnagar Municipal Corporation has issued letter to the petitioner on 16.1.2003 by referring to earlier letter of the Corporation dated 28.12.2002 and the letter issued by the Executive Engineer of the Corporation on 28.10.2002 addressed to the petitioner by giving reference in respect of the Rojkam prepared earlier in presence of the petitioner on 14.4.2002 and the Resolution passed by the Standing Committee on 19th September, 2002 and the petitioner contractor was called upon to furnish certain documents and the petitioner contractor was informed that on furnishing these details, the Corporation will take steps for clearing final bill. The petitioner Contractor has already filed undertaking and withdrawn the security deposit to the tune of Rs.36,250=00. As found from the rejoinder affidavit filed by Shri Haribhai, that it is only because of the financial condition of the petitioner, the undertaking was given on 24th June, 2000. It is also his case in the rejoinder affidavit that it is only because of the temptation given by the respondent and due to undue influence by the officers of the Corporation, the counter agreement was made. It is the contention of Mr. Parmar that by executing counter agreement, the effect of original agreement cannot be cancelled and when the matter was pending before the trial Court. In para 6 of the rejoinder affidavit of the petitioner, it is averred by the petitioner, which I reproduce partly as under :-

"The matter was pending before the Court of Civil Judge (SD) of Jamnagar and during this period, the respondents have with malafide intention

> influenced upon the petitioner to sign upon the agreement and with the understanding that as per the counter agreement, the respondents will perform their obligations, the petitioner has signed on the said counter agreement, it can be considered that the agreement was signed by duress and not only that when such type of the agreement is obtained by the respondents, it is void ab-initio as per the amended section 28 of the Indian Contract Act, 1872."

10. Considering this back ground, according to me during the pendency of the suit filed by the petitioner and fresh agreement was arrived at between the parties and parties have signed and executed another counter agreement, this fact is not disclosed by the petitioner when petitioner has approached this court for appointment of an Arbitrator. In view of the subsequent counter agreement arrived at between the parties, the parties have agreed to resolve their dispute as per fresh agreement in the agreement and when fresh agreement is arrived at between them by substituting earlier agreement, the petitioner is not entitled for seeking an appointment of an Arbitrator by relying upon the earlier agreement. According to me the relief sought for by the petitioner for appointment of an Arbitrator by relying upon the earlier agreement between the parties and the clause of Arbitration, is no way available to the petitioner and hence, the application deserves to be rejected. As I am deciding this petition only on this ground, I am not referring any decisions, that has been cited before me. With this observation, petition is rejected with no costs. Notice is discharged.

(D.K. Trivedi, J.)
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